

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

REVIEW OF THE COMMISSIONS)
REGULATIONS GOVERNING ATTRIBUTION)
OF BROADCAST INTERESTS)

MM DOCKET NO. 94-150
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REVIEW OF THE COMMISSIONS)
REGULATIONS AND POLICIES)
AFFECTING INVESTMENT IN THE)
BROADCAST INDUSTRY)

MM DOCKET NO. 92-51

REEXAMINATION OF THE COMMISSION'S)
CROSS INTEREST POLICY)

MM DOCKET NO. 87-154

COMMENTS TO NOTICE OF PROPOSED RULE MAKING
BY THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. (INTV), hereby files the following comments in response to the Commission's *Notice of Proposed Rule Making* in the above captioned proceeding.¹ The attribution rules are the foundation upon which all investment in free, over-the-air broadcasting rests. The Commission's decision in this proceeding will directly impact on the continued financial health of over-the-air television.

In other proceedings the Commission has documented the tremendous growth in video media markets. Cable, DBS, wireless-cable (i.e. MMDS),

¹Notice of Proposed Rule Making in MM Docket No. 94-150, FCC 94-324, (released January 12, 1995), (hereinafter cited as "Notice").

and the local telephone companies are competing with local television stations. These multichannel technologies not only compete with broadcasting for viewers and advertising revenue, they also compete with television broadcasters for capital. Today, investors wishing to participate in the video marketplace have numerous investment opportunities. When the FCC last examined its attribution rules in 1984, television broadcasting was still the predominant video delivery service. Competition has become fierce in recent years and the Commission must recognize this fact. As a result, modifications to the FCC's current attribution rules may be necessary to insure that over-the-air television broadcasting remains an attractive investment.

Given the plethora of media investment opportunities, the Commission should presume that relaxation of some of its attribution rules will stimulate capital flow towards off-air television stations. The converse is also true. Tightening some of the investment structures may restrict investment.

This is not simply a domestic issue. With the privatization of media industries throughout the world, American media investors are not limited to the shores of the United States. The world has gone global and overseas business opportunities abound.² In this environment, the FCC should be careful not to "tighten" its attribution rules and create incentives for American capital to move off-shore.

²See generally, U.S. Department Of Commerce, NTIA, *Globalization of the Mass Media*, January 1993.

Also, the Commission may want to resolve its multiple ownership rulemaking proceeding before it addresses attribution issues. Proposals contained in this proceeding which would "tighten" several aspects of the attribution rules could have a devastating impact on capital formation, if the multiple ownership rules are not relaxed.³ The converse is also true. Relaxation of the multiple ownership rules may stimulate investment and attenuate the disincentives that may arise from "tightening" the existing rules.

I. Stockholder Benchmarks

A. Voting Stock

INTV supports raising the voting stock benchmarks from five to ten percent. On this point the *Notice* observes that previous commenters did not provide sufficient evidence to justify raising this attribution benchmark. The Commission's concern is that there may be substantial controlling or influential interests associated with stock interests under the ten percent threshold.

At the outset, the question should be narrowed. The existing rules already presume that interests under five percent will not result in influence or control. The real question is whether such influence will exert itself when there is an incremental stock interest above

³In any event if the FCC decides to consider heretofore non-attributable interests as cognizable under the attribution rules, all existing business arrangements should retain their non-attributable status. If the FCC does not grandfather these arrangements, then there may be a precipitous capital drain from broadcasting. Investors will be forced to reshape their portfolios and in some cases may be forced to divest themselves of some broadcast investments.

five percent but less than ten percent. In other words, does a ten percent rise in stock ownership sufficiently increase a shareholder's influence that it should be recognized by the FCC's rules. There is simply no evidence to indicate this will be the case.

The Commission correctly points out that other agencies employ a ten percent benchmark in other regulatory contexts. For example, the SEC uses the 10 percent benchmark to trigger "insider trading" restrictions. The Department of Transportation employs the same benchmark for certain reporting requirements applied to air carriers. Even the Clayton Act uses the 10 percent trigger.⁴

While these ten percent benchmarks are not designed to protect diversity, they bear directly on protecting competition. In this sense, they are directly analogous to the FCC's competitiveness concerns. In fact, the competitive concerns underlying the SEC and Clayton Acts may be more compelling than the Commission's goals, given the increased competition in media markets. For example, insider trading can distort not only a specific company's stock prices, but undermines the country's faith in the fairness of the stock market. This could affect the entire economy. The same is true for the antitrust aspect of the Clayton Act. If a ten percent benchmark is sufficient to protect these nationally important interests, then it most certainly is sufficient to protect the FCC's interests in a highly competitive and diverse video marketplace.

⁴Notice at paras 39-44.

In 1984, the Commission could make a compelling case for limiting cognizable stock interests to ten percent. At the time, there was only nascent competition in media markets. Cable was in its infant stage. There was no DBS and the telephone companies did not even conceive of entering the video business. Thus, the danger to diversity and competition resulting from non-cognizable, but influential stock interests, was significant. Today, there are a plethora of competing media voices. Thus, even if significant influences arise with a ten percent benchmark, the overall harm to diversity and competition will be attenuated.

B. Passive Investors

The attribution benchmark for passive investors should be raised to 20 percent or higher. Passive investors generally have no interest in running the day to day decision of a broadcast station. They are in the business of lending money and have little interest in influencing day to day operations.

The Commission's concern that transfers of large blocks of stock might affect management decisions seems misplaced. It is reasonable to assume that transfers of large blocks of stock from passive investors would be acquired by other passive investors. Of course, if transfers were made to non-passive investors, then the passive investor rule would, by definition, not apply. Also, changes in management resulting from such stock transfers would be policed by the Commission. Under its existing rules key managerial positions (officers and

directors) are cognizable under the attribution rules.

The Notice states that the Commission does not intend to extend the class of passive investors to include pension funds, commercial banks and certain investment advisors. It places the burden on commenters to explain why these investors should be considered passive. The burden, however, is on the Commission to rationally explain why certain classes of investors are accorded disparate regulatory treatment. For example, no reason is given for excluding commercial banks from the category of passive investors. The 1984 attribution rules provided no explanation and the Notice provides no additional analysis. At the very least, commercial banks should be included in the passive investor category.

INTV agrees that, in some circumstances, investment advisors may not qualify as truly passive investors. Indeed, including investment advisors in the category of passive investors may create a loophole in the attribution rules. It is possible that an investment advisor could be working on behalf of a specific corporation or individual that has a strong interest in the day to day operations of a broadcast station.

Moreover, the current rules contain safeguards to insure the investment is truly passive. Each licensee is required to certify that the passive investor has not attempted to exert influence or control over the affairs of the licensee. If further safeguards are required, the FCC could consider a procedure where a passive investor exceeding the current ten percent benchmark would file a disclaimer indicating

that it will not be involved in the day to day operations of the station.

Finally, the Commission solicits information on whether increasing the passive investment benchmark or expanding the category of passive investors will increase capital formation in broadcasting. On this point the Notice cites to the fact that other factors such as the volatile nature of broadcast revenues and the rise of alternative media are responsible for the undercapitalization of the industry.⁵ This position makes no sense. If there are exogenous reasons for capital flowing away from broadcasting, it is incumbent on the Commission to make changes in the rules that will attract capital. At the very least, current passive investors in television, who have already demonstrated the desire to invest in broadcasting, should be permitted to increase their portfolios without triggering the attribution rules.

In summary the Commission should increase the passive investor benchmark to 20 percent voting stock. It should also expand the class of passive investors to include commercial banks.

II. Non-attributable interests

The Notice proposes several changes which would make, heretofore, non-attributable interest cognizable under its attribution rules. As a general matter INTV sees no need to change the existing attribution standards. The Notice cites to no examples and presents no data

⁵Notice at para. 49 n.97.

demonstrating that the present rules are being abused. Rather, it expresses hypothetical concerns. In this regard, the Commission should have specific evidence before it departs from time honored business law concepts.

Non-voting stock conveys no legal power to control the affairs of a corporation. In this regard, the FCC's 1984 attribution order is correct. An attempt to exert influence by converting non-voting stock to voting stock is an empty gesture if it would result in a violation of the multiple ownership rules. In single majority shareholder situations, minority shareholders have no legal control over the corporations. The ability of a limited partner to influence the general partners are currently circumscribed by the FCC insulation rules. There is no need to adopt an equity benchmark at this time.

INTV agrees that the standards currently employed for limited partnerships should be extended to limited liability corporations. As for business development companies and widely held limited partnerships, FCC rules should be modified to avoid conflicts with federal and state securities law.

III. Cross-Interests and Multiple Cross-Interests.

Certainty is the foundation for all investment. There is nothing more uncertain than the Commission's case by case cross interest policy. The policy attempts to police interests which do not rise to

the level of a cognizable interest under the attribution rules. Rules governing ownership should be set forth in specific regulations. If certain arrangements convey the ability to influence, they should be included in the regulations. If not, then these arrangements should be permitted without additional *ad hoc* review.

In its present form the cross-interest policy focuses on key employees, non-attributable equity interests and joint ventures. These remaining vestiges of the cross interest policy should be eliminated. There should be little concern over key employees. In small companies these employees usually hold positions that are already cognizable under the attribution rules. Moreover, an employee has an obligation to his/her employer to serve the best interests of the company. Most companies have internal conflict of interest rules and non-compete clauses in their employment contracts. An employee found working for the competition usually gets fired.

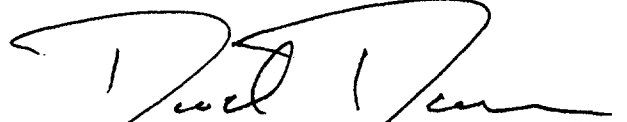
Focusing on non-attributable interests undermines the logic of the Commission's attribution rules. The attribution rules define the level of ownership that is of concern to the Commission. Once this benchmark is established, it makes little sense to second guess this judgment on a case by case basis under the guise of the cross interest policy. Local markets are intensely competitive. Market forces along with other federal and state laws should alleviate any Commission concerns regarding behavior by entities that fall below the attribution thresholds.

The Commission's attribution rules have largely supplanted the joint venture aspect of the cross interest policy. The only remaining part of the policy involves situations where two existing broadcasters form a joint venture to start a third facility, yet, remain under the attribution benchmarks. Again, increased competition in local markets attenuate the need for a second look. If the joint venture falls below the attribution benchmarks, it should be permitted.

The Commission should refrain from enacting policies directed at multiple cross interests. Subjecting such arrangements to the burdens of an *ad hoc* review process is unnecessary. Again, the relationships that are of concern to the Commission should be spelled out in its attribution rules.

Respectfully submitted,

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